BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

LIGIA B. PADRON	)	
Claimant	)	
	)	
VS.	)	Docket No. 264,104
	)	
IBP, INC.	)	
Self-Insured Respondent	)	

ORDER

The self-insured respondent requested review of the October 10, 2003 Award by Administrative Law Judge Brad E. Avery. The Board heard oral argument on February 24, 2004.

APPEARANCES

Michael G. Patton of Emporia, Kansas, appeared for the claimant. Gregory D. Worth of Roeland Park, Kansas, appeared for the self-insured respondent.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award. At oral argument before the Board, the parties agreed that the July 20, 2001 and the October 5, 2001 preliminary hearing transcripts were also part of the evidentiary record.

ISSUES

The nature and extent of claimant's disability was the sole issue for determination by the Administrative Law Judge (ALJ). Respondent argued it provided claimant five different accommodated jobs within the treating doctor's restrictions but claimant's attempts to perform the jobs did not last long enough to demonstrate a good faith effort to retain appropriate employment. Consequently, respondent argued claimant should be limited to her functional impairment because she failed to make a good faith effort to retain accommodated employment.

Conversely, claimant noted she attempted to perform each of the alleged accommodated jobs but they required physical activities which exceeded her work restrictions. Consequently, claimant argued she was entitled to a work disability (a permanent partial disability greater than the percentage of her functional impairment) because the offered accommodated work was outside her restrictions and she was physically unable to perform those jobs.

The ALJ determined claimant was unable to perform the accommodated jobs because of her work-related injuries and awarded claimant a 65.5 percent work disability based upon a 76 percent wage loss and a 55 percent task loss.

Respondent requested review of the nature and extent of disability. The specific issue raised is whether claimant made a good faith effort to retain accommodated work provided by respondent. If not, respondent argues claimant should be limited to her 10 percent functional impairment.

Claimant requests the Board to affirm the ALJ's determination that she made a good faith effort to perform the offered accommodated jobs. Because she was physically unable to perform the work claimant further requests the Board to affirm the ALJ's determination that she is entitled to a 65.5 percent work disability.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

Claimant began to experience pain in her back and neck from performing her hook and knife job duties of trimming meat. Claimant reported her problems and after seeing Dr. Hutchison on August 9, 2000, she was placed on light-duty work. As she continued to receive medical treatment she was later taken off work on November 10, 2000.

Dr. Glenn M. Amundson, a board certified orthopedic surgeon, first examined claimant on September 1, 2000. X-rays revealed mild spondylosis or arthritic change in the spine. The doctor diagnosed degenerative disk disease but ordered a cervical and lumbar MRI to further investigate the cause of claimant's complaints in those areas. The MRI testing on September 11, 2000, revealed a small degenerative bulge at C5-6 and degenerative disks at L2-3 and L4-5. The doctor further noted the MRI appeared to reveal a small herniation on the left at L4-5 which did not impinge on any nerve roots as well as a posterior tear of the disk at L4-5.

Dr. Amundson recommended a conservative course of treatment including epidural steroid injections. After receiving the epidural steroid injections the claimant returned to Dr. Amundson for re-evaluation on November 22, 2000. Claimant indicated the injections

worsened her condition. And she continued to complain of pain in her upper and lower extremities. Consequently, Dr. Amundson ordered an EMG and nerve conduction studies.

The EMG and nerve conduction studies were performed on December 14, 2000. The studies showed active denervation in the left C7 consistent with radiculopathy. Although this finding was consistent with claimant's complaints of arm pain it was not consistent with the MRI findings nor Dr. Amundson's physical examination of claimant. Consequently, the doctor ordered a myelogram CT scan.

The myelogram CT scan confirmed the MRI findings and Dr. Amundson concluded there were no surgically correctable lesions in either claimant's cervical or lumbar spine. The doctor opined that claimant's degenerative disk disease was the cause of her neck and low back pain but he concluded there was no objective anatomical explanation for claimant's complaints in her upper and lower extremities.

On January 3, 2001, Dr. Amundson recommended physical therapy. On February 2, 2001, he reviewed a functional capacity evaluation that claimant had taken. Dr. Amundson noted it was difficult to extrapolate claimant's work ability because of claimant's self-limiting and inconsistent effort during the FCE testing. But he concluded claimant should be assigned to the sedentary to light physical demand capability. And the doctor concluded claimant had reached maximum medical improvement for her injuries. Finally, Dr. Amundson rated claimant in DRE Cervicothoracic Category II for her cervical complaints for a 5 percent impairment and DRE Lumbosacral Category II for her lumbar complaints for a 5 percent impairment. The two ratings combined for a 10 percent whole body impairment.

On February 7, 2001, claimant returned to work performing the job washing cow tails. Claimant left that job on March 23, 2001, because it required her to bend to wash the tails and twist to place the tails on the conveyor belts. Claimant felt the job was outside Dr. Amundson's restrictions against bending and twisting.

On February 17, 2001, Dr. Amundson assigned permanent restrictions of frequent lifting/carrying 0 to 5 pounds, occasional lifting/carrying 0 to 10 pounds. The doctor also noted claimant should restrict frequent grip, pinch push/pull and reach above shoulder level. Restrictions of occasional bend, twist, squat, kneel, climb and carry were also imposed. Lastly, the doctor restricted standing/walking to three hours per eight-hour workday and sitting to six hours per eight-hour workday.

On March 22, 2001, Dr. Amundson changed claimant's permanent restrictions to include only occasional lifting of 10-20 pounds, avoidance of sustained or awkward postures of the lumbar or cervical spine and avoidance of repetitive bending, pushing, pulling, twisting, lifting, or overhead work activities on other than an occasional basis.

The claimant returned to see Dr. Amundson on August 29, 2001, with escalating pain complaints. The doctor recommended claimant undergo additional physical therapy as well as a trial using a TENS unit. But when claimant returned to see the doctor on September 26, 2001, she complained the physical therapy worsened her cervical pain and the TENS unit likewise aggravated her condition. The doctor again concluded claimant was at maximum medical improvement and that the rating he had provided claimant was still appropriate.

At her attorney's request, the claimant was examined by Dr. Peter V. Bieri on December 20, 2002. The doctor noted that diagnostic testing had revealed a herniated nucleus pulposus at C5-6 as well as bulging at L4-5. He further noted that nerve conduction studies were consistent with a left C7 radiculopathy. Based upon those test findings the doctor rated claimant with 15 percent for a DRE Cervicothoracic Category III and 5 percent for a DRE Lumbosacral Category II. The doctor combined the ratings for a 19 percent permanent partial whole person functional impairment.

Dr. Bieri provided claimant permanent restrictions that would limit her occasional lifting to 20 pounds, frequent lifting not to exceed 10 pounds and negligible constant lifting. The doctor restricted claimant to no more than occasional stooping, bending and twisting at the level of the waist. And any reaching and handling should be performed no more than frequently. Finally, the doctor noted that claimant's sustained standing should be for no more than four hours at a time with one hour for postural adjustment.

But on cross-examination Dr. Bieri agreed that his physical examination was negative for radiculopathy. And that without a finding of radiculopathy the claimant would more appropriately be placed in DRE Cervicothoracic Category II which would result in a 5 percent functional impairment rating. Upon cross-examination, the doctor stated:

> Q. So your physical examination produces nothing close to a significant sign of radiculopathy, does it?
>
> A. That's correct.[1]

The ALJ adopted Dr. Amundson's 10 percent functional impairment rating and the Board agrees. As previously noted, the absence of radiculopathy in Dr. Bieri's examination of claimant corroborates Dr. Amundson's determination that claimant's condition warrants placement in DRE Cervicothoracic Category II which provides a 5 percent impairment. Combined with both doctor's 5 percent rating for claimant's lumbar complaints results in a 10 percent permanent partial whole person functional impairment.

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[1] Bieri Depo. at 50.

On approximately January 25, 2002[2], claimant returned to work at a job on the line where she had to pull and trim meat. Claimant only worked one day and had to quit because of back pain. She felt the job required her to repetitively bend as well as stand all day which she concluded violated Dr. Amundson's restrictions.

Claimant was advised to go home by the plant nurse but was told to come back every Wednesday and respondent would attempt to find her another job. On February 18, 2002, claimant went back to work to perform a job described as "add/remove bungee cord." Claimant performed this job for seven hours but said she simply did not have the strength to do the job and she felt the job was outside her restrictions. Claimant was told to return the following day and talk to the personnel manager. The following day claimant met with the personnel manager and requested a job within her restrictions and was told he would try to find such a job.

On March 26, 2002, claimant returned to a job she described as "cleaning bands." She was only able to perform that job for three days. She quit because the job required her to constantly bend over and be on her feet the entire work shift. Claimant complained of back pain and cold to the plant nurse.

Claimant continued to return to the respondent every Wednesday seeking work. On June 2, 2002, she again attempted to return to work for respondent in a job described as "monitor of mispack." Claimant performed this job for 2 weeks. She said the problem with performing this job was that it required her to bend over to see the labels on the boxes and it required her to twist to push a button if the labels were not right or the boxes got stuck. This job also required that claimant stand her entire 8-hour work shift although she noted she got one 15-minute break as well as a lunch break. Claimant complained of back and right leg pain after performing this job.

Lisa Bessmer is employed by respondent as a medication case manager. After an injured employee reaches maximum medical improvement and is provided permanent work restrictions, Ms. Bessmer then attempts to find work within the employee's permanent restrictions in respondent's plant.

The process is to compare an injured employee's work restrictions with jobs that are opening for bid. If the job does not require physical activity which exceeds the restrictions the injured employee can place their name on the bid sheet. But the jobs are awarded based upon seniority. If the injured employee wins the job, then a letter with the job description as well as a video of the job is sent to the authorized physician to ensure the

[2] The dates claimant testified she attempted the accommodated work and the dates Ms. Bessmer indicated claimant attempted the various jobs do not correspond. However, the descriptions of the jobs match and Ms. Bessmer agreed she was not certain her records were accurate.

job is within the doctor's restrictions. The job is not formally offered to the injured employee until the doctor's response is received.

Ms. Bessmer utilized this process in finding jobs for claimant. Ms. Bessmer initially indicated that each time claimant successfully bid on a job she only attempted the work for a day or less. However, on cross-examination she admitted that her information regarding how long claimant may have worked on the jobs might not be accurate. She further agreed that all the jobs offered claimant required that claimant stand for at least seven hours of her eight-hour workday.

Claimant's last day worked was July 1, 2002, but she continued to return to respondent every Wednesday to see if there is work available for her. On August 28, 2002, claimant obtained a part-time job at Quizno's. Claimant works approximately 20 hours a week earning $5.75 an hour. Claimant noted that she is unable to stand for more than four hours because she experiences back pain.

The primary issue raised by respondent is whether claimant made a good faith effort to retain appropriate employment. The record in this case establishes that claimant accepted accommodated work on several occasions. But respondent argues claimant did not attempt the various jobs for long enough to establish whether or not she could perform the work. And that Dr. Amundson had agreed each job was within the permanent work restrictions he had provided for claimant.

The Kansas Appellate Courts, beginning with *Foulk*[3], have barred a claimant from receiving work disability benefits if the claimant is capable of earning 90 percent or more of her pre-injury wage at a job within her medical restrictions, but fails to do so, or actually or constructively refuses to do so. The rationale behind the decision is that such a policy prevents claimants from refusing work and thereby exploiting the workers compensation system. *Foulk* and its progeny are concerned with a claimant who is able to work, but either overtly, or in essence, refuses to do so.[4] Before claimant can claim entitlement to work disability benefits, she must first establish that she made a good faith effort to obtain or retain appropriate employment.[5]

The Board has also held workers are required to make a good faith effort to retain their post-injury employment. Consequently, permanent partial general disability benefits are limited to the worker's functional impairment rating when, without justification, a worker voluntarily terminates or fails to make a good faith effort to retain a job that the worker is

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[3] *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995).

[4] *Oliver v. Boeing Co.*, 26 Kan. App. 2d 74, 977 P.2d 288, *rev. denied* 267 Kan. 889 (1999).

[5] *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

capable of performing that pays at least 90 percent of the pre-accident wage. On the other hand, employers must also demonstrate good faith. In providing accommodated employment to a worker, *Foulk* is not applicable where the accommodated job is not genuine,[6] where the accommodated job violates the worker's medical restrictions,[7] or where the worker is fired after making a good faith attempt to perform the work but experiences increased symptoms.[8]

The good faith of an employee's efforts to find or retain appropriate employment is determined on a case-by-case basis. The claimant testified that she made a good faith attempt to perform the offered jobs but experienced the onset of pain as she attempted to perform the work activities.

The respondent notes that the treating physician approved each of claimant's accommodated jobs as being within the restrictions he had provided claimant. But the doctor was only provided a written description of the proposed job's physical requirements and claimant noted the actual job duties did not always match the written description. Although respondent contends the doctor was also provided video depictions of the jobs, Dr. Amundson testified that he was not provided tapes depicting the jobs and that he had very little knowledge about the jobs at respondent's plant.

Dr. Amundson's restrictions varied during the course of claimant's treatment and the doctor was equivocal regarding his permanent restrictions. Ms. Bessmer had requested the doctor explain what his permanent restrictions were and he provided a response. However, he later agreed that, although not mentioned in his explanation of permanent restrictions that he sent Ms. Bessmer, it would nonetheless be appropriate for claimant to restrict her standing/walking to three hours per day and he concluded claimant should not work in cold environments. Those restrictions would essentially eliminate claimant's ability to perform all of the offered accommodated jobs. Moreover, Dr. Bieri also restricted claimant from standing more than four hours at a time.

The Board adopts the ALJ's finding that claimant was unable to perform the accommodated jobs because of her work-related injuries and affirms the Award in all other respects.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Brad E. Avery dated October 10, 2003, is affirmed.

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[6] *Tharp v. Eaton Corp.*, 23 Kan. App. 2d 895, 940 P.2d 66 (1997).

[7] *Bohanan v. U.S.D. No. 260*, 24 Kan. App. 2d 362, 947 P.2d 440 (1997).

[8] *Guerrero v. Dold Foods, Inc.*, 22 Kan. App. 2d 53, 913 P.2d 612 (1995).

IT IS SO ORDERED.

Dated this _____ day of March 2004.

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BOARD MEMBER

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BOARD MEMBER

_____
BOARD MEMBER

c: Michael G. Patton, Attorney for Claimant
Gregory D. Worth, Attorney for Respondent and its Insurance Carrier
Brad E. Avery, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director